

EFREN CHAVEZ-TENA

Claimant

V.

FAVIAN JIMENEZ AND

ERICKSON CUSTOM BUILDING, LLC

Respondents

AND

KANSAS BUILDING INDUSTRY WORKERS

COMPENSATION FUND

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 1,068,618

ORDER

STATEMENT OF THE CASE

Erickson Custom Building, LLC, (Erickson) and Kansas Building Industry Workers Compensation Fund (Kansas Building) appealed the April 22, 2015, preliminary hearing Order entered by Administrative Law Judge (ALJ) Thomas Klein. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. Roy T. Artman of Topeka, Kansas, appeared for Erickson and Kansas Building. Vincent J. Garcia of Wichita, Kansas, appeared for Favian Jimenez (Jimenez). John C. Nodgaard of Wichita, Kansas, appeared for the Kansas Workers Compensation Fund (Fund).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the April 8, 2015, preliminary hearing and exhibits thereto; the transcript of the April 17, 2014, preliminary hearing and exhibits thereto; the transcript of the March 9, 2015, statement under oath of Tyler Gasper and exhibits thereto; the transcript of the January 16, 2015, deposition of Matthew Flynn; the transcript of the January 16, 2015, deposition of Ryan Erickson and exhibit thereto; the transcript of the April 17, 2014, deposition of Favian Jimenez and exhibit thereto; and all pleadings contained in the administrative file.

ISSUES

The ALJ determined claimant sustained personal injury by accident arising out of and in the course of his employment when he fell off a roof while working for respondent Jimenez. The ALJ determined Matthew Flynn, a project manager for Erickson, regularly contracted with Jimenez to perform roofing work for Erickson and Mr. Flynn was hired and paid by Tyler Gasper, the property owner where the fall occurred. The ALJ concluded Erickson was claimant's statutory employer and assessed liability against Erickson and Kansas Building.

Erickson and Kansas Building dispute Erickson was claimant's statutory employer because it was not hired to roof Mr. Gasper's three houses; it was not paid for roofing Mr. Gasper's houses, including the job on which claimant was injured; and Mr. Flynn merely arranged for Jimenez to roof Mr. Gasper's houses.

Jimenez asserts his annual payroll did not meet the statutory minimum for the Kansas Workers Compensation Act (Act) to apply. Jimenez contends Mr. Flynn or Erickson is responsible for claimant's injuries.

The Fund asserts Jimenez' annual payroll was less than \$20,000 and the Act does not apply.

Claimant filed no brief and presumably requests the preliminary hearing Order be affirmed.

The issues are:

1. Does the Kansas Workers Compensation Act apply?
2. At the time of his accidental injury, was claimant a statutory employee of Erickson?

FINDINGS OF FACT

Claimant began working for Jimenez on September 7, 2013, as a roofer. On November 14, 2013, he fell from a roof at 314 West 7th in Hutchinson and sustained serious injuries. The nature of claimant's injuries and medical treatment is not germane to the issues and is not set forth herein.

According to claimant, he was paid by the square, but later was paid by the week and averaged \$800 per week for the seven or eight weeks he worked prior to his accident. While working for Jimenez, claimant worked on seven or eight houses. Jimenez and two or three other workers worked on claimant's crew. Jimenez worked on all the houses, but the other workers did not. Claimant did not know what the other workers were paid.

Claimant testified Matt (Mr. Flynn) would line up work on behalf of Erickson for Jimenez. Claimant thought Mr. Flynn worked for Erickson because of a sign on the truck he drove. Claimant indicated that on one occasion he saw Mr. Flynn hand money to Jimenez. According to claimant, of the eight houses he worked on, Mr. Flynn inspected four, including one of the houses in Hutchinson where claimant worked. Claimant acknowledged he did not know if roofing the house where he fell was an Erickson job.

Jimenez testified that prior to January 2013, he worked for Jomax Construction. From January to April 2013, he worked for Alex Flores. From April through July 2013, he again worked for Jomax. In August or September 2013, Jimenez began roofing houses for Erickson. He intended on roofing until December 2013, when he planned on returning to work for Jomax, which he did.

Jimenez knew Mr. Flynn previously, which is how he came to work for Erickson. Jimenez did not know if he was going to be an employee or independent contractor. He admitted not buying workers compensation insurance because he thought Erickson provided it.

Jimenez indicated he “had to get my own people,”¹ did not complete an employment application and did not go through any training. Erickson did not provide Jimenez tools, a vehicle, uniforms or any benefits. Jimenez saw, but never spoke to, the owner of Erickson.

According to Jimenez, Mr. Flynn would come to the job sites, oversee the work, told Jimenez what to tell his workers to do and controlled the work throughout the workday. Jimenez testified he (Jimenez) was in charge on the job site. The customers were provided by Erickson and Jimenez did not solicit business. Materials for the job were always provided by Mr. Flynn, but Jimenez did not know who bought the materials.

Jimenez indicated Erickson always paid by check. Jimenez was paid \$45 per square he roofed and used the money to pay himself and the people working under him. Jimenez paid his workers by taking \$25 to \$28 from each square and dividing it among his workers, including himself. He would keep the remainder for expenses. Jimenez paid cash, did not keep a list of his workers, what he paid them or report their names to Erickson.

Jimenez testified Mr. Flynn would line up side jobs for him to do. Mr. Flynn would know if the job was an Erickson job or a side job and tell Jimenez. When Mr. Flynn showed up on the job sites for the side jobs, he was driving an Erickson truck. Jimenez testified Mr. Flynn lined up as one job three rental properties to roof and it was from one of those houses that claimant fell. Jimenez indicated he was not paid by Erickson for the

¹ Jimenez Depo. at 12.

job where claimant was injured. Mr. Flynn was paid for roofing the three houses and, in turn, paid Jimenez. Jimenez was paid \$45 per square on three different occasions and thought he was paid \$4,000 to \$5,000 for the three houses. Jimenez testified that on two other occasions he also worked side jobs for Mr. Flynn for cash.

Jimenez' 2013 individual income taxes indicated his roofing business had a gross income of \$28,610, contract labor expenses of \$8,400, total expenses of \$18,724 and a net profit of \$9,886. The 2013 tax return showed claimant was paid \$2,800 for labor. Attached to Jimenez' 2013 tax return was a 1099-Miscellaneous form from Erickson indicating Jimenez was paid \$28,609.62 in 2013 and a W-2 form from Jomax Construction showing gross wages of \$5,124. Jimenez indicated he kept no records of his gross receipts and admitted the \$28,610 in gross income listed on his 2013 tax return did not include the five side jobs he worked.

Mr. Gasper testified he knew Mr. Flynn and contacted him to roof the house at 314 West 7th and two other rental houses in Hutchinson. Mr. Gasper purchased sheeting, shingles and supplies for the 314 West 7th house and paid Mr. Flynn to roof the houses, who then paid Jimenez. Mr. Gasper indicated he had little contact with Jimenez, because Jimenez did not speak English. Mr. Gasper recalled paying \$55 per square for shingling and \$15 per square to install the sheeting and paid Mr. Flynn with cash. Mr. Gasper's records showed he paid Mr. Flynn \$4,720 for labor to roof the three houses, including \$1,200 for 314 West 7th.

Erickson does general residential and light commercial contracting, including tearing off and replacing residential roofs. Mr. Erickson testified Mr. Flynn was a salesman, estimator and project manager. Mr. Erickson indicated he was unaware Mr. Flynn was doing side jobs in addition to working for Erickson.

According to Mr. Erickson, anyone who roofed houses for him in 2013 was a roofing subcontractor and was paid by check. In 2013, Jimenez completed 13 roofing jobs for Erickson and most jobs took approximately two days. Erickson would pay the workers compensation insurance premiums on jobs subcontracted to Jimenez. Erickson paid Jimenez with checks, records of which were placed into evidence. The check for the first job Jimenez did for Erickson was issued on August 30, 2013, and the check for the last job was issued on December 5, 2013. Mr. Erickson did not know how or what Jimenez paid his crews. Mr. Erickson thought Jimenez may have performed roofing jobs for other contractors, but did not have any personal knowledge of whether Jimenez did so. On occasion, Mr. Erickson would visit a Jimenez job site and observed Jimenez had a crew of up to six workers, including Jimenez.

Mr. Erickson testified he does not know Mr. Gasper and did not know of claimant's injury until he received a letter from claimant's attorney. Until he was deposed, Mr. Erickson was unaware Mr. Flynn estimated and contracted to roof houses for Mr. Gasper and used Jimenez to do the work. Mr. Erickson indicated he was told by

Mr. Flynn that he only gave Jimenez' telephone number to Mr. Gasper and never received any money from Mr. Gasper. Erickson never paid a check to Jimenez for roofing 314 West 7th for Mr. Gasper.

Mr. Flynn testified he has been a salesman, project manager and estimator for Erickson since July 2011 or 2012. Erickson charges customers around \$200 per square to roof a house and out of that amount, Erickson pays its roofing subcontractors \$50 or \$55 per square. Mr. Flynn knew Jimenez for seven years and did not know if Jimenez roofed houses for other contractors in 2013. On the 13 jobs Jimenez roofed for Erickson in 2013, Mr. Flynn was the estimator, salesman and project manager. He observed Jimenez and one or two other workers roofing houses.

According to Mr. Flynn, Mr. Gasper asked him in 2013 if he knew a roofer and Mr. Flynn provided Mr. Gasper Jimenez' name and telephone number. Mr. Flynn indicated he was not a salesman, estimator or project manager for the roofing job at 314 West 7th and either Jimenez or Mr. Gasper did the estimating. Mr. Flynn did not know how Mr. Gasper paid Jimenez and did not contact Jimenez to tell him what he would be paid for the job. Mr. Flynn denied he was paid by Mr. Gasper for the job at 314 West 7th and, in turn, paying Jimenez.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."³

K.S.A. 44-503(a) provides:

Where any person (in this section referred to as principal) undertakes to execute any work which is a part of the principal's trade or business or which the principal has contracted to perform and contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any worker employed in the execution of the work any compensation under the workers compensation act which the principal would have been liable to pay if that worker had been immediately employed by the principal; and where compensation is claimed from or proceedings are taken against the principal, then

² K.S.A. 2013 Supp. 44-501b(c).

³ K.S.A. 2013 Supp. 44-508(h).

in the application of the workers compensation act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the worker under the employer by whom the worker is immediately employed. For the purposes of this subsection, a worker shall not include an individual who is a self-employed subcontractor.

The overwhelming evidence is that Jimenez was not the subcontractor for Erickson on the roofing job at 314 West 7th. Erickson did not contract with Mr. Gasper to roof his three houses and did not know Jimenez was roofing Mr. Gasper's houses. Erickson received no payment for roofing 314 West 7th and entered into no contract with Jimenez to roof Mr. Gasper's houses. Erickson did not pay anyone to roof 314 West 7th. Jimenez, Mr. Gasper, Mr. Flynn and Mr. Erickson indicated Erickson was not involved in roofing 314 West 7th. This Board Member finds Erickson was not claimant's statutory employer.

Next, a determination must be made if the Act applies. K.S.A. 44-505(a), in part, states:

Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:

. . .

(2) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer had a total gross annual payroll for the preceding calendar year of not more than \$20,000 for all employees and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as part of the total gross annual payroll of such employer for purposes of this subsection;

(3) any employment, other than those employments in which the employer is the state, or any department, agency or authority of the state, wherein the employer has not had a payroll for a calendar year and wherein the employer reasonably estimates that such employer will not have a total gross annual payroll for the current calendar year of more than \$20,000 for all employees, except that no wages paid to an employee who is a member of the employer's family by marriage or consanguinity shall be included as a part of the total gross annual payroll of such employer for purposes of this subsection; . . .

In *Slusher*,⁴ Wonderful House opened for business in 2007, the year Slusher was injured, and had an annual payroll of less than \$20,000. Wonderful House had no payroll in the previous year, 2006. The ALJ ruled Wonderful House was not exempt from workers compensation under K.S.A. 44-505(a)(2) because it was reasonable to assume it would exceed \$20,000 in gross annual payroll for non-family members in 2008, the next calendar year. In fact, total payroll for non-family members for the first six months of 2008 was \$11,690.30. The Board reversed, ruling Wonderful House was exempt from workers compensation under K.S.A. 44-505(a)(3). In the Board's view, the ALJ should not have considered the 2008 expected payroll. In the Board's analysis, Wonderful House was exempt since the restaurant had no payroll in 2006 and neither had, nor expected to have, a total gross payroll of more than \$20,000 in the current calendar year, 2007. The Kansas Court of Appeals affirmed the Board's ruling.

Jimenez' 2013 tax returns indicate he paid \$8,400 for contract labor during 2013, and is likely low, as Jimenez testified he did not keep a list of his workers, what he paid them and always paid cash. In the preceding year, 2012, Jimenez had no payroll, as he was not in business. Jimenez was in business during only a part of 2013, the year claimant was injured, and Jimenez' payroll was less than \$20,000. Jimenez testified it was his intent only to roof until December 2013, when he returned working for Jomax. There is insufficient evidence to show Jimenez had or intended to have a gross payroll of more than \$20,000 in 2013. Accordingly, this Board Member finds claimant failed to prove he was covered by the Act.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁶

WHEREFORE, the undersigned Board Member finds the Kansas Workers Compensation Act does not apply, claimant was not a statutory employee of Erickson and reverses the April 22, 2015, preliminary hearing Order entered by ALJ Klein.

IT IS SO ORDERED.

⁴ *Slusher v. Wonderful House Chinese Restaurant*, 42 Kan. App. 2d 831, 217 P.3d 11 (2009).

⁵ K.S.A. 2013 Supp. 44-534a.

⁶ K.S.A. 2013 Supp. 44-555c(j).

Dated this ____ day of July, 2015.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge